STATE OF MICHIGAN
IN THE
SUPREME COURT

MICHIGAN TOOLING ASSOCIATION WORKERS' COMPENSATION FUND, in its own right and as Subrogee of DISTEL TOOL & MACHINGE CO.,
Plaintiff-Appellee,

SC Case No. 127834

-vs-

FARMINGTON INSURANCE AGENCY, L.L.C.,
Defendants-Appellant,
MACHINERY MAINTENANCE SPECIALISTS, INC.,
Defendant,
and
FARMINGTON INSURANCE AGENCY, INC.,
Third-Party Plaintiff –Appellant,

-vs-

EMPLOYERS INSURANCE OF WAUSAU a Mutual Company,
and WAUSAU INSURANCE COMPANIES,
Third-Party Defendants-Appellees

127834

ON APPEAL FROM
THE COURT OF APPEALS docket no. 249013
and THE OAKLAND COUNTY CIRCUIT COURT
Case No. 01-030684-CK, Hon. Colleen O'Brien

THIRD-PARTY DEFENDANTS/APPELLEES EMPLOYERS INSURANCE OF WAUSAU, AND WAUSAU INSURANCE COMPANIES' BRIEF IN OPPOSITION TO THIRD-PARTY PLAINTIFF/APPELLANT FARMINGTON INSURANCE AGENCY'S APPLICATION FOR LEAVE

Patrick Burkett (P33397)
Appellate Counsel for Plaintiff
2000 Town Center, Suite 900
Southfield, MI 48075-1100
(248) 355-0300

Michelle A. Thomas (P35135)
Attorney for Farmington Ins Agency
400 Galleria Officentre, Suite 550
Southfield, MI 48034
(248) 353-4450

Larry W. Davidson (P26423)
Attorney for Employers and Wausau
1050 Wilshire Drive, Suite 320
Troy, MI 48084
(248) 649-7800

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COUNTER-STATEMENT OF THE ORDERS FROM WHICH THIRD-PARTY PLAINTIFF/APPELLANT TAKES THIS LEAVE FOR APPEAL AND RELIEF SOUGHT

On December 13, 2002, the Oakland County Circuit Court issued an opinion in this case in favor of Third-Party Defendants/Appellees. The opinion was incorporated into a Judgment dated February 5, 2003, which was entered in the form of a Corrected Final Judgment on May 28, 2003.[1] On December 7, 2004, the Michigan Court of Appeals affirmed the lower courts opinion in full. Third-Party Plaintiff-Appellant now seeks relief from the Judgments of the courts below.

Third Party Defendants/Appellees request this Court either deny the instant Application for Leave to Appeal or peremptorily affirm the findings of the courts below.

[1] The corrected judgment incorporated the inadvertent omission of the Third Party Defendant, Wausau Insurance Companies and the disposition of Third Party claim.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. **WHETHER THE TRIAL COURT AND COURT OF APPEALS CORRECTLY CONCLUDED THAT THIRD-PARTY PLAINTIFF/APPELLANT FIA OWED A DUTY TO DISTEL TOOL / MTA?**

Third Party Defendants / Appellees:	are indifferent
Third Party Plaintiff / Appellant answers:	"NO"
The Trial Court answered:	"YES"
The Court of Appeals answered:	"YES"

II. **WHETHER THE TRIAL COURT AND COURT OF APPEALS CORRECTLY CONCLUDED THAT THIRD-PARTY DEFENDANTS / APPELLEES EMPLOYERS INSURANCE OF WAUSAU AND WAUSAU INSURANCE COMPANIES WERE NOT NEGLIGENT IN ANY OF THEIR ACTIONS OR INACTIONS, EITHER COMPARATIVELY OR OTHERWISE?**

Third-Party Defendants / Appellees answer:	"YES"
Third-Party Plaintiff / Appellant answers:	"NO"
The Trial Court answered:	"YES"
The Court of Appeals answered:	"YES"

I. INTRODUCTION & SUMMARY OF ARGUMENT

The mere fact that FIA claims something is not disputed does not make it so. Contrary to what is claimed, much of what is alleged in FIA's Application for Leave is very much in dispute.[2] In this Brief in Opposition, Third Party Defendants/Appellees, Employers Insurance of Wausau and Wausau Insurance Companies, (hereinafter "Wausau" collectively), move to have this Court deny Third Party Plaintiff /Appellant FIA's Application for Leave to Appeal and/or peremptorily affirm the decisions of the courts below. The grounds for this request are several.

First, FIA overstates the import of the issue raised in its Application for Leave. The Court of Appeals decision did not create any new duty of care targeting only insurance agents. Rather, the duty that arises under the Court of Appeals decision is the one to foreseeable victims of blatantly negligent acts whose harms are easily prevented that is shared by us all. *See Terry v. City of Detroit,* 226 Mich. App. 418, 424; 573 N.W.2d 348(1997)(citing seven possible factors to consider when determining if a duty exists). Nor is this duty, as it applies to insurance agents, unduly demanding. On the contrary, insurance agents need "only to exercise care to ensure that the information in a certificate of insurance is accurate when it is issued....not [as FIA suggests]....to guarantee the accuracy of the information [in the future, or] inform any non-named parties of subsequent cancellations." (Court of Appeals Opinion dated 12/7/04 attached as **Exhibit A**, p.4, hereinafter "COA"). Accordingly, FIA has failed to state grounds under MCR 7.302(B) upon which its appeal might properly be taken and permitting it to go forward could

[2] For example, on page 25 of its Application for Leave FIA claims that "it is also undisputed that....FIA had absolutely no knowledge on 3/6/98 that Wausau had canceled [its policy]." In stark contrast, however, the trial court found that "Wausau's evidence indicates that Notice of Cancellation was mailed to FIA" and the Court of Appeals extended a presumption to both Wausau and FIA that based on their individual internal policies their respective mailings were both received. (The trial court Opinion & Order dated 12/13/02 attached as **Exhibit B**, p.13, hereinafter "TCO"; COA 5)

only prove a waste of this Court's already limited resources.[3]

Second, to whatever extent FIA did not owe a duty to Distel Tool, Wausau is equally free of any negligence as a party one step further removed. Conversely, to the extent FIA did owe a duty to Distel Tool, the evidence presented clearly supports the lower courts findings that FIA was responsible for failing to make any effort to discern the status of coverage at the time of issuing its certificate of insurance.

Finally, whether the instant injuries arose, as the lower courts found, entirely out of FIA's negligence in issuing its certificate of insurance with no coverage in place, or were in some way attributable to the fraudulent acts of MMS in procuring this certificate with the knowledge that its coverage had been terminated, or the inattention of Distel Tool in accepting this certificate that was made out to the benefit of another, or through some combination thereof, Wausau is not a party properly made to bear any fault in this matter. Wausau's own actions in terminating MMS' coverage and in providing all interested parties with notice of that cancellation were done free of any negligence. Moreover, any authority to issue certificates given to FIA through past practice did not permit the instant issuance in that it was not made in "a diligent and reasonably skillful workmanlike manner." (COA p.3, citing *Williams v. Polgar,* 391 Mich 6, 21; 215 N.W.2d 149 (1974)).

[3] Additionally, in the trial court's opinion, denying FIA's Application for Leave and causing it to bear the liability in *(Continued. . .)*

II. STANDARD OF REVIEW

The instant appeal involves issues of both legal rulings and factual determinations. The former are reviewed *de novo*, while the latter are reviewed for clear error. *American Alternative Ins. Co., Inc, v. York,* 470 Mich. 28, 30; 679 N.W.2d 306 (2004); *Federated Publications, Inc., v. City of Lansing,* 467 Mich. 98, 106; 649 N.W.2d 383 (2002); *AMBS v. Kalamazoo County Road Commission,* 255 Mich. App. 637, 651-52 (2003); *Chapdelaine v. Sochocki,* 247 Mich. App. 167, 169 (2001); *Oxendine v Secretary of State,* 237 Mich. App. 347, 349 (1999). A finding is clearly erroneous where the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been made. *AMBS,* 255 Mich. App. at 652; *Walters v. Snyder,* 239 Mich. App.453, 456 (2000). In reviewing a lower court's decisions on its findings of fact, an appellate court will give deference to the trial court's superior ability to judge the credibility of the witnesses who appeared before it. *AMBS,* 255 Mich. App. at 652; *Rellinger v. Bremmeyr,* 180 Mich. App. 661, 665 (1989).

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this matter would serve public policy in preventing like occurrences in the future. (TCO, pp. 10-11).

III. COUNTER-STATEMENT OF FACTS

The instant action arises out of a work related injury occurring on or about April 1, 1998. (Trial courts' Opinion & Order dated 12/13/02 attached as **Exhibit B**, p.4, hereinafter "TCO"). From that accident, arose a host of claims, including claims for indemnification, breach of contract, negligence, and defendant Farmington Insurance Agency's, (hereinafter "FIA"), third-party claim of negligence against Employers Insurance of Wausau and Wausau Insurance Companies (hereinafter "Wausau" collectively). (TCO, pp.2-3). [4]

At the time of this accident, the injured employee, Tives Staten, was working as an employee of Machinery Maintenance Specialist, Inc.'s, (hereinafter "MMS"). (TCO, p.3). MMS was in the business of repairing heavy machinery, often on the premises of the companies for whom it was providing services. (TCO, p.2; see also trial transcript, "tr", dated 2/22/02, pp.49, 122).

Prior to this accident, MMS had received workers compensation insurance through Wausau Insurance, the insurer assigned by the Michigan Workers Compensation Facility. (TCO, p.3). The policy issued to MMS had an effective date of September 30, 1997. (TCO, p.3). Coverage under the policy was intended to remain in effect through September 30, 1998, assuming MMS made good on all of its obligations under the policy. (TCO, p.3).

In the course of their dealings, MMS failed to pay certain sums due and also to cooperate in an audit needed to determine what rates were appropriate under the policy. (Tr. 2/22/02, 144 - 145). When follow up efforts to right these defects failed, a Notice of Cancellation was sent to

[4] The essence of FIA's claim of negligence against Wausau appears to be that Wausau was somehow negligent in failing to advise FIA of its' cancellation of MMS's workers' compensation coverage, an unsupported claim that could not be further from the truth. FIA's theory of comparative negligence against Wausau, raised for the first time in this appeal, is less certain, but equally meritless.

MMS. (Tr. 2/22/02, pp.60-62, 144-145; Notices of Cancellation & Cancellation attached as **Exhibit C**). Beyond the notice to MMS, a properly addressed copy of this notice was sent to FIA by regular mail and a Notice of Termination of Liability was sent to the Michigan Department of Consumer and Industry Services in Lansing. (TCO, pp.3, 12, 13; Exhibit C; Notice of Termination attached as **Exhibit D**).

The notice to MMS was received by its president, Arnold Primak, on January 29, 1998, (return receipt attached as **Exhibit E;** TCO, p.3; Tr. 2/22/02 pp.60-62). The Michigan Department of Consumer and Industry Services likewise received its notice in Lansing on January 30, 1998, (Exhibit D – the stamped numbers across the top of the notice confirm its receipt on that date; TCO, p.12). The notice that was sent to FIA was never returned to Wausau as undeliverable and was therefore presumed to have been received.[5] (TCO, p.3).

On February 20, 1998, Wausau cancelled its policy to MMS, effectively terminating any coverage under the policy. (TCO, p.3). This was the date of cancellation identified in the aforementioned notices. A Cancellation was sent to both MMS and FIA on February 23, 1998. (Exhibit C).

On or about March 6, 1998, roughly two weeks after the policy was cancelled and more than five weeks since the notices of cancellation had been received, Arnold Primak, president of MMS, went to FIA and requested that it issue a certificate of insurance for the cancelled policy.

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[5] Rather unpersuasively, FIA alleges to have not received this Notice of Cancellation. Equally unpersuasive, are its claims that it sent a copy of this certificate of insurance to Wausau. In its Application for Leave, FIA argues that its claims of sending a notice of issuance should be given equal weight to Wausau's claim of sending notice of cancellation. (Application for Leave, p. 39). However, such an argument ignores the independently corroborating evidence Wausau presents with regard to the mailing of its own notice, including the receipt of the Notice of Cancellation by MMS, the receipt of the Notice of Termination by the Michigan Department of Consumer and Industry Services and the properly addressed notice to FIA without it being returned undeliverable, and also the absence of any like evidence to support FIA's claims of sending notice of its issuance to Wausau, including the fact that FIA's certificate of insurance does not even include Wausau's address. (TCO, p.3 ; Exhibits C,D & E; FIA's

(Continued. . .)

(TCO, p. 3; Tr. 2/22/02, pp.78, 80-81). He did so with full knowledge that the policy had previously been cancelled. (TCO, p. 3; Tr. 2/22/02, pp.78, 80-81).

On that same day, FIA issued its certificate of insurance naming David Freedman Inc. as the certificate holder. (FIA's Certificate of Insurance issued on 3/6/98 attached as **Exhibit F**; TCO, p.3; Tr. 2/22/02, pp.132, 157, 178-79; 4/8/02, pp. 10-11). FIA did so without doing anything to discern the current status of coverage under the policy. (TCO, p.13). FIA's issuance was made independently, without, or at least well outside of, any expressed or implied authority from Wausau, the Servicing Carrier. (TCO p.13; COA, p.5).

FIA's issuance was made in clear contravention of the procedures set forth in the Procedure Handbook of the Michigan Workers' Compensation Placement Facility. (Cited portions of the procedure handbook attached as **Exhibit G**). In the introductory material, the handbook warns that within this handbook "you [the agent] will find a description of the procedures you **must** follow." *Id.* The specific procedures to be followed are set forth in SECTION II: PROCEDURES, under the appropriate subheading CERTIFICATES OF INSURANCE PROCEDURE. *Id.* There it states, in unequivocal terms, that "certificates of insurance are to be issued by the **Servicing Carrier** within 5 days of **receipt of the request**...[and further that if a more immediate issuance is required that] "**the Servicing Carrier should be contacted** to see what arrangements can be agreed upon." *Id.* The handbook adds in SECTION I, DUTIES AND RESPONSIBILITIES IN THE FACILITY, that although "a Servicing Carrier may give [the agent] **certain authority**, such as permission to issue certificates of insurance [in limited instances], ... **such rights are not to be routinely assumed by an agent**). *Id*

Certificate of Insurance attached as **Exhibit F**). Moreover, the Court of Appeals already did assign equal weight to *(Continued. . .)*

Sometime in March 1998, Primak, used the certificate of insurance he obtained from FIA to secure additional employment with Distel Tool & Machine Co., an *undisclosed* employer. (Hereinafter "Distel"). (TCO, pp. 4, 8; Tr. 2/22/02, p.156; Tr. 4/8/02, pp.38, 59-60; Tr. 6/19/02, pp. 10, 16). Distel accepted the certificate naming Freedman Inc. as certificate holder as proof of insurance. (TCO, pp.4,8). It did so without making any attempt to contact the named servicing insurance company.[6] (TCO, pp. 4, 8; Tr. 2/22/02, p.156; 6/19/02, pp.10-12, 22).

Through this collection of errors MMS was allowed to gain employment at Distel Tool without possessing the requisite workers' compensation insurance. (TCO, p.4). Not surprisingly, on or around April 1, 1998, (a little more than a month after the Wausau workers compensation policy had been cancelled), Tives Staten, an employee of MMS, suffered an injury at the Distel facility while in the course and scope of his employment.

Because MMS did not possess the requisite coverage, Distel Tool, a member of the Plaintiff fund, Michigan Tooling Association Workers' Compensation Fund (hereinafter "MTA"), was determined to be Staten's statutory employer and made responsible for his workers' compensation benefits under MCL 418.171(1). (TCO, p. 4).

Distel / MTA then initiated the instant litigation to recover the sum of $153,502.85, constituting the workers compensation benefits that had been paid and the legal fees that were incurred. (TCO, p.4).

On December 13, 2002, the trial court entered its Opinion & Order finding that FIA was alone to blame for the damages to Distel / MTA. (**Exhibit B**, TCO, p.11). In doing so, the court

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the parties' respective mailings in determining FIA to be the lone negligent party. (COA p.5).

[6] The trial court determined that Distel's reliance on a certificate of insurance naming Freedman Inc. as the certificate holder was not an act of negligence. (TCO, p. 10). The Court of Appeals affirmed this determination. (COA, p.3).

made specific findings that Wausau was not negligent in its acts of canceling coverage, providing notice of cancellation, or otherwise. (TCO, p.13).

On December 7, 2004, the Court of Appeals issued its own Opinion affirming the Judgment against FIA in all respects. (**Exhibit A**, "COA"). In its Opinion, the Court of Appeals likewise found that Wausau had not contributed to the Plaintiff's injury. (COA, p.5).

The instant appeal arises from the opinions of the courts below. Through its Application for Leave to Appeal, FIA seeks to upset the findings of both courts.

IV. LAW & ARGUMENT

A. WHETHER OR NOT THE TRIAL COURT AND COURT OF APPEALS CORRECTLY CONCLUDED THAT THIRD-PARTY PLAINTIFF / APPELLANT FIA OWED A DUTY TO DISTEL TOOL / MTA IS WITHOUT CONSEQUENCE TO THIRD PARTY DEFENDANTS / APPELLEES EMPLOYERS OF WAUSAU AND WAUSAU INSURANCE COMPANY

1. To The Extent That FIA Is Found Not To Have Owed A Duty To Distel Tool, Employers Of Wausau And Wausau Insurance Company, Parties One-Step Further Removed, Are Equally Without Any Fault.[7]

In the first of its two questions presented, FIA argues that it did not owe a duty to Distel Tool, an unknown third-party recipient of this certificate of insurance. FIA's argument concludes that because it did not have a duty to Distel Tool, a finding of negligence cannot be made against it. Both the trial court and Court of Appeals rejected this argument, holding that FIA did owe a duty to Distel Tool as a foreseeable victim of its negligent acts. Specifically, the Court of Appeals found that "Distal was clearly in a class of foreseeable parties who might rely on the certificate of insurance issued by Farmington and a party to whom Farmington therefore owed a duty of care." (COA, p. 3). In so holding, the Court of Appeals relied on *Williams v. Polgar*, 391 Mich. 6, 18-21; 215 N.W.2d 149 (1974)(holding that an abstracter has a duty to perform his

service in a diligent and reasonably skillful workmanlike manner to all foreseeable relying third-parties).

To whatever extent this Court would now disagree with the findings of the courts below, Wausau would argue that its being a party one step further removed from Distel Tool would necessitate a finding that it too is without any fault. That is, if Distel Tool was an unforeseeable victim to FIA, the issuer of this certificate of insurance who necessarily knew that someone would be relying on it, it was even more of one to Wausau who understood the policy to be cancelled.[8]

2. *Assuming A Duty Does Exist, The Trial Court Correctly Concluded That The Conduct Of Third-Party Plaintiff/Appellant FIA Was So Far Below The Applicable Standard Of Care That It Was Properly Assessed With Full Responsibility For The Plaintiff's Injuries.* [9] [10]

Without making any further account for the relationship between Distel / MTA and FIA or what duty may or may not have arisen out of that relationship,[11] Wausau aligns itself with the trial court in asserting that FIA's actions in issuing a certificate of insurance without the approval of the servicing insurance company fell well below the applicable standard of care. (TCO, p.11). As the trial court correctly found, FIA was completely negligent in its issuance of a certificate of insurance on March 6, 1998 for a policy that had been effectively terminated on February 20, 1998. (TCO, p.11). At a minimum, FIA should have taken some steps to confirm that the policy

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[7] The existence of a duty requisite to the imposition of negligence liability poses a question of law which is reviewable de novo. *Beaty v. Hertzberg & Golden, P.C.*, 456 Mich 247, 262 (1997).

[8] In its Application for Leave, FIA states that it defies all reason to attribute awareness of Distel Tool to FIA but not to Wausau. (Application for Leave, p.27). However, FIA's argument misses the important distinction made above that while Distel issued the certificate and had reason to know that someone, presumably the named certificate holder David Freedman, would be relying on it, Wausau was operating under the presumption that all activity had ceased with regard to this cancelled policy. Thus, a finding that Distel Tool was a foreseeable victim to FIA, but not to Wausau is a very real possibility.

[9] The Court of Appeals found that the issue of breach was not raised on appeal. (COA, p. 4). FIA appears to have continued to waive such argument here.

remained in effect at that time. (TCO, p.13). This is increasingly true, given the notice of cancellation that was sent to FIA on January 26, 1998 and the ease in which this confirmation could have been obtained, e.g. a phone call to Wausau or the State of Michigan.[12] (TCO, p.13 (holding that had FIA contacted Wausau this situation would not have occurred); Tr. 8/28/02, p.111).

Had FIA taken any of these minimally burdensome steps, the policy's termination would have been discovered, no certificate would have been issued, and MMS would have been forced to obtain a new policy of workers' compensation insurance prior to starting its work at Distel. FIA's actions in this matter are especially egregious in that it was not even charged with developing this "check first" policy for itself, but rather, the procedure handbook promulgated by the Michigan Workers' Compensation Placement Facility clearly instructs agencies that it is the servicing carrier that is to issue these certificates. (Exhibit G; see also TCO, p.13 (holding that had FIA followed the procedures of the Worker's Compensation Handbook and contacted Wausau this situation would not have occurred).[13]

FIA's negligence being as apparent as it is, the Court need look no further to discern the cause of the Plaintiff's injuries.

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[10] Whether a duty has been breached is a question of fact reviewed for clear error. *Perry v. Hazel Park Harness Raceway,* 123 Mich. App. 542, 549 (1983).

[11] See argument in section IV (A) above.

[12] FIA claims to have not received this notice, but, as the trial court found, the evidence presented shows otherwise - the notice included FIA's proper address and was never returned as undeliverable, was indisputably received by MMS, and a similar document was filed with the Department of Consumer and Industry Standards in Lansing on January 23, 1998. (TCO, p. 13; Tr. 8/28/02, p.111).

[13] FIA was further negligent in failing to notify Wausau of the certificate of insurance issued to Mr. Primak on March 9, 1998. FIA claims to have sent notice to Wausau, but produces no documentation in support of these claims. (TCO, p. 13). Based on this complete dearth of evidence, the absence of Wausau's address anywhere on the certificate of insurance, and the self-serving nature of FIA's claims, the trial court properly rejected such argument. (TCO, p.13).

B. The Trial Court And The Court Of Appeals Correctly Concluded That Third-Party Defendants / Appellees Employers Insurance Of Wausau And Wausau Insurance Companies Were Not Negligent In Any Of Their Actions Or Inactions, Either Comparatively Or Otherwise [14]

A review of the evidence presented does not reveal any clear error in the lower courts findings concerning Wausau's actions. *See AMBS*, 255 Mich. App. at 652 (holding that a finding is clearly erroneous where the reviewing court on the entire record is left with the *definite and firm conviction* that a mistake has been made). Rather, the trial court was correct in holding that there was "no negligence on the part of Wausau", (TCO, p.13), and the Court of Appeals was equally correct in its finding that "Wausau did not contribute to the [plaintiff's] injury." (COA p.5).

FIA tries to upset the lower courts findings by distinguishing the showing required under the comparative fault statutes from what is required in an ordinary claim of negligence. However, FIA's interpretation of these statutes stretches their language too far. MCL 600.6304 provides in pertinent part:

> (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including Third Party defendants and nonparties, the court, unless otherwise agreed by all parties to the action, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:
>
> (a) The total amount of each plaintiff's damages.
> (b) The percentage of the total **fault** of **all persons that contributed** to the death or injury, including each plaintiff and each person released from liability under section 2925d, regardless of whether the person was or could have been named as a party to the action.
>
> (2) In determining the percentages of **fault** under subsetion (1)(b), the trier

[14] Issues of comparative negligence are usually questions of fact that are reviewed for clear error. *Koehler v. Detroit Edison Co.*, 383 Mich. 224; 174 N.W.2d 827 (1970); *Wigginton v. City of Lansing*, 129 Mich. App. 53; 341 N.W.2d 228 (1983); *Bay City v. Carnes*, 3 Mich. App. 623, 143 N.W.2d 148 (1966).

of fact shall consider both the **nature of the conduct of each person at fault** and the extent of the causal relation between the conduct and the damages claimed.]

* * *

(4) Liability in an action to which this section applies is several only and not joint...a person shall not be required to pay damages in an amount greater than his or her percentage of fault as found under subsection (1).

* * *

(8) as used in this section, **"fault"** includes an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a **legal duty**, or any conduct that could give rise to the imposition of strict liability, that is a **proximate cause** of [the] damage sustained by a party.

FIA interprets this language to mean that liability is properly assessed to anyone who has "contributed, in any fashion, to the [plaintiff's] damages." (Application for Leave, p.37). Such an interpretation completely ignores the definition of fault contained in subsection (8). That definition requires that the conduct or omission being evaluated be a "proximate cause" of the plaintiff's injuries. See also *Lamp v. Reynolds,* 249 Mich. App. 591, 605; 645 N.W.2d 311 (2002) (holding that the comparative fault statutes apply to all persons whose conduct is a proximate cause of the plaintiff's damages).

To establish the requisite proximate cause a showing of both cause in fact and legal cause must be made. *Weymers v. Khera,* 454 Mich. 639; 563 N.W.2d 647 (1997); *Lamp, supra* at 599; *Skinner v. Square D Co,* 445 Mich. 153, 162-163; 516 N.W.2d 476 (1994). The conduct being evaluated is to be considered a cause in fact if the plaintiff's damages, more than likely, would not have occurred but for the conduct. *Lamp, supra* at 599; *Haliw v. Sterling Heights*, 464 Mich. 297, 310; 627 N.W.2d 581 (2001); *Skinnner, supra* at 163. If this "but for" element is established, it must then be shown that, in light of the foreseeability of the consequences of the

at-fault conduct, the actor should be held legally responsible for the consequences, i.e. it is socially and economically desirable to do so. *Lamp, supra* at 599-600; *Haliw, supra*, quoting *Skinner, supra* at 163; *Helmus v. Michigan Dept of Transportation,* 238 Mich. App. 250, 256; 604 N.W.2d 793 (1999); *Wechsler v. Wayne Co Rd Comm,* 215 Mich. App. 579, 596; 546 N.W.2d 690 (1996). Importantly, the mere possibility of an act being a cause, either theoretical or conjectural, is not sufficient to establish the necessary causal link. *Jordan v. Whiting Corp.,* 396 Mich. 145, 151; 240 N.W.2d 468 (1976). Rather, the conduct or omission being evaluated must be viewed as having been a "substantial factor" in causing the harm. *Schutte v. Celotex Corp.,* 196 Mich. App. 135; 492 N.W.2d 773 (1992); *Coy v. Richard's Industries, Inc.*, 170 Mich. App. 665; 428 N.W.2d 734 (1988). Indeed, only those acts "which operate to produce [the] particular consequences without the intervention of any independent, unforeseen cause, without which the injuries would not have occurred" are properly termed a "legal" or "proximate" cause of the injury. *Lamp, supra*, quoting *Helmus, supra* at 256.

Here, nothing that is alleged of Wausau can be said to have been a proximate cause of the Plaintiff's injuries.

1. *FIA's Claims Of Implied Authority Through Past Practice Do Not Show The Requisite Causal Connection For A showing Of Comparative Negligence*

FIA alleges that, by failing to object to past practice, Wausau gave it the implied authority to issue certificates of insurance and that had it not done so the instant certificate would not have been issued. (Application for Leave, p. 42). This, maintains FIA, establishes the necessary causal connection between Wausau's inaction and the injury to Distel Tool / MTA,

thus permitting some portion of the fault in this case to be attributed to Wausau.[15] Outside of FIA's allegations, however, there is no support for such a claim.

Initially, even if FIA did issue 90 certificates on behalf of Wausau over an 8-year period and even if this past practice did create some limited authority on the part of FIA to issue certificates on behalf of Wausau, this does not compel a finding that FIA was operating within that limited authority in issuing the instant certificate. This is because the circumstances under which those other issuances were made are unknown. To accept FIA's position that the instant issuance, (for which FIA did nothing to discern the status of coverage at the time of issuance), is consistent with the authority that was gained through its past practice, one would have to conclude that Wausau had granted FIA the unrestricted authority to make issuances for which FIA was never to provide Wausau with any notice, either before or after the issuance.[16] To so hold, the Court would have to accept that Wausau had set aside all that is known about minimizing business risk and opened itself up to blind liability. Such a construction is nothing short of fantastic and was rightfully summarily dismissed by the courts below.

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[15] Although it is not entirely clear what to make of FIA's argument concerning implied authority, this has to be what is intended. Indeed, an argument that the parties past dealings had established some sort of agency relationship for purposes of showing some type of pass through liability would not be properly raised in this appeal of comparative fault issues. MCL 600.6304 clearly requires that any fault assessed as comparative fault be fault attributable to the actor himself. Moreover, any argument of agency would be contrary to the parties relationship as set forth in the Michigan Workers' Compensation Placement Facility Handbook, where it clearly states that "you, [FIA], are not a contract agent or agency of the Servicing Carrier, [Wausau], ...[and further that FIA has] no authority from the Servicing Carrier to bind or cancel coverage or to otherwise act within such an agency relationship." (Exhibit G).

[16] A theory that is contradicted by FIA's very claims of Wausau having received the 90 certificates it had previously issued. But nonetheless a theory that FIA must necessarily be relying on because in its Application for Leave FIA requests this Court put its claim of sending a notice of issuance to Wausau on equal footing with Wausau's claim of providing notice of cancellation to it. (Leave to Appeal p.39). Assuming the Court were to set aside the independently corroborating evidence of Wausau's notice of cancellation being sent and the absence of any such evidence with regard to FIA's claim and grant FIA's requests there are only two possible scenarios - either both notices were sent and received or neither was sent at all. If neither was sent, the fact that FIA did not contact Wausau before issuing the certificate serves as an admission that it was not going to provide Wausau with notification of this issuance at any time, an act that, consistent with the argument above, would fall well outside any limited authority it was operating under. Were the alternative true and both mailings presumed to have been received, this would be an admission that FIA issued its certificate of insurance after receiving Wausau's notice that the policy had been cancelled.

A more reasonable construction of the arrangement between Wausau and FIA as it likely existed is that any authority FIA had gained through past practice was limited to the issuance of certificates for which it had exercised the due diligence necessary to ensure that the information on the particular certificate, including the status of coverage, was correct at the time of issuance. Such a construction was being endorsed by the Court of Appeals when it aptly recognized that, "authority to issue a certificate is not synonymous with having no duty to exercise care in doing so." (COA, p.5) In issuing the instant certificate without checking with Wausau, the State of Michigan, or taking some other minimally burdensome step to see if coverage remained in place at the time of issuance FIA acted outside the scope of any authority it possessed and cannot then attribute its negligent acts to that authority.[17] Consequently, FIA's claims with regard to past practice do not present grounds for upsetting the decisions of the courts below.

2. *Wausau's Own Actions Were Likewise Free Of Any Negligence*

Regarding its own acts, (also found to be free of any negligence by the courts below), prior to canceling MMS' coverage, Wausau placed a properly addressed copy of its Notice of Cancellation in the U.S. mails to both MMS and FIA and made the appropriate filings with the Michigan Department of Consumer and Industry Services. At the time of cancellation, there was no reason to suspect that any of these efforts had been anything but successful. On the contrary, all indications, including the proof of service signed by MMS President Arnold Primak as well as the absence of any undeliverable notification in regards to the notice sent to FIA, were that the

[17] It is also worth noting that the Placement Handbook, of which FIA acknowledges that it had a duty to follow, expressly forbids the practice of issuing certificates without seeking prior approval. (Application for Leave, p. 32) This being so, the likelihood of any objection from Wausau, which was nothing more than the Placement Facility's assigned insurer, accomplishing what the Facility's own written protocols were unable to do, is a causal theory so speculative that it was properly rejected by the courts below. *Jordan v. Whiting Corp.*, 396 Mich. 145, 151; 240 N.W.2d 468 (1976)(holding that the mere possibility of something being a cause of an injury, either theoretical or conjectural, is not sufficient). Again, the more reasonable inference is that FIA was likely to go on conducting its business in the way it saw fit with or without any acquiescence on Wausau's part.

notices had been received.

After FIA's issuance, made just weeks later, there was nothing Wausau could do to change what was to happen next. Indeed, had Wausau learned of FIA's issuance it could do nothing more than contact the two parties it new to exist, MMS and the named certificate holder, Freedman Inc. Contacting either, or both of them, however, would have done nothing to prevent the harms to Distel Tool.[18] (COA, p.5; Tr. 8/28/02, pp.149-150). Staten was injured at the Distel

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[18] Distel could not have been directly contacted. (COA, p. 5). Again, neither FIA nor Wausau had any knowledge of Distel, an undisclosed employer who had accepted as proof of insurance a certificate naming Freedman Inc as the certificate holder. (TCO, pp.4, 8; Tr. 2/22/02, p.132; 4/8/02, pp 71-72; 6/19/02pp. 10, 16; 8/28/02, pp. 49-150). As Distel was not known to exist, it was unavailable for contact. Without Distel being made aware of the policy's cancellation, the events leading to Staten's injury would have unfolded just the same. All witnesses questioned at trial, FIA employees included, have admitted as much.

Q. Okay. Now, I have one more question and, and follow, following along with me. Let's assume that, that everything happened as you believe it happened here, okay?
A. Okay.

Q. That is that Mr. Primak requested that you issue a certificate of insurance to Friedman. That you issued that certificate of insurance to Friedman, okay?
A. Right.

Q. That you advised Wausau, you sent them a copy of the certificate of insurance, okay?
A. Right.

Q. And I think we've established that your belief is that, that when Wausau received that certificate they should have looked and said oh this policy's been canceled. And the appropriate action by Wausau would have been to notify you?
A. Myself, the certificate holder and the insured.

Q. Okay. So, you, Mr. Primak and Friedman?
A. Right.

Q. Wausau would have no way of knowing that Dick Distel was holding the certificate, would they?
A. No, neither did I.

Q. Exactly. So, even if Wausau had contacted you and said hey this policy's been canceled, that wouldn't have changed the fact that, that you didn't know that Distel had the certificate and therefore you would not have advised Mr. Distel accordingly?
A. Correct

Testimony of David Clappison of FIA, 8/28/02, pp.149-150.

Likewise, Becky Steingold of FIA; Larry Polek, Plaintiff's technical expert; William Brunett, FIA's technical expert; and David Clappison again, all gave similar, if not identical, responses. (Tr. 4/8/02, pp.71-72; Tr. 4/8/02, pp.212-213; Tr. 8/28/02, pp.58-59; Tr. 2/22/02, pp.165-166, respectively).

Tool jobsite, a wholly separate entity from Freedman Inc. Contacting Freedman Inc. would then have done nothing to alert Distel Tool of MMS' lack of coverage. (TCO, p.3; COA, p.5). Likewise, contacting MMS was equally pointless in that, given its president's fraudulent acts in procuring the certificate in the first place, the likelihood of MMS coming forth at that time with information about the Distel Tool job seems less than likely. (Tr. 2/22/02, pp.80-81; *Jordan v. Whiting Corp.*, 396 Mich. 145, 151; 240 N.W.2d 468 (1976)(holding that the mere possibility of something being a cause of an injury, either theoretical or conjectural, is not sufficient); *Lamp, supra* at 599(holding that even a showing of "but for" causation requires a showing that the damages "more than likely" would not have occurred but for the conduct)). That the Court of Appeals agreed with the futility of any such action is evidenced in the court's terming it such. (COA, p.5).

Because the evidence supports that Wausau was not negligent in its pre-issuance actions and anything it could have done after FIA made its issuance would not have prevented MMS' employment at Distel Tool or the resulting injuries there is no grounds for upsetting the findings of the courts below.

IV. CONCLUSION

Because the instant appeal is one which does not involve legal principles of major significance to the state's jurisprudence or otherwise show sufficient grounds to be heard in front of this Court, and because the findings of the lower courts, including their findings of no comparative negligence on the part of Wausau, are fully supported in the facts and in the law, FIA's Application for Leave is properly denied at this time.

Moreover, to the extent that FIA is found not to owe a duty to Distel Tool as an undisclosed recipient of the certificate of insurance, its arguments against liability are equally

true of Wausau.

IV. RELIEF REQUESTED

For the reasons set forth above, Third-Party Defendants/Appellees Employers Insurance of Wausau and Wausau Insurance Companies respectfully request this Court either deny the instant Application for Leave to Appeal or peremptorily affirm the findings of the courts below.

Respectfully submitted,

Larry W. Davidson (P26423)
Jason R. Mathers (P66022)
Attorney for Third-Party Defendants
1050 Wilshire Drive, Suite 320
Troy, MI 48084-1526
(248) 649-7800

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